

LIBRARY

RECEIVED COURT, U. S. No. 72-851

FILED

JAN 22 1973

MICHAEL BODAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1972

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known
as the ONEIDA NATION OF NEW YORK, also known as the
ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN
NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF
INDIANS OF WISCONSIN, INC.,

Petitioners,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF
MADISON, NEW YORK,

Respondents.

**SUPPLEMENTAL
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

GEORGE C. SHATTUCK
BOND, SCHOENECK & KING
Attorneys for Petitioners
One Lincoln Center
Syracuse, New York 13202

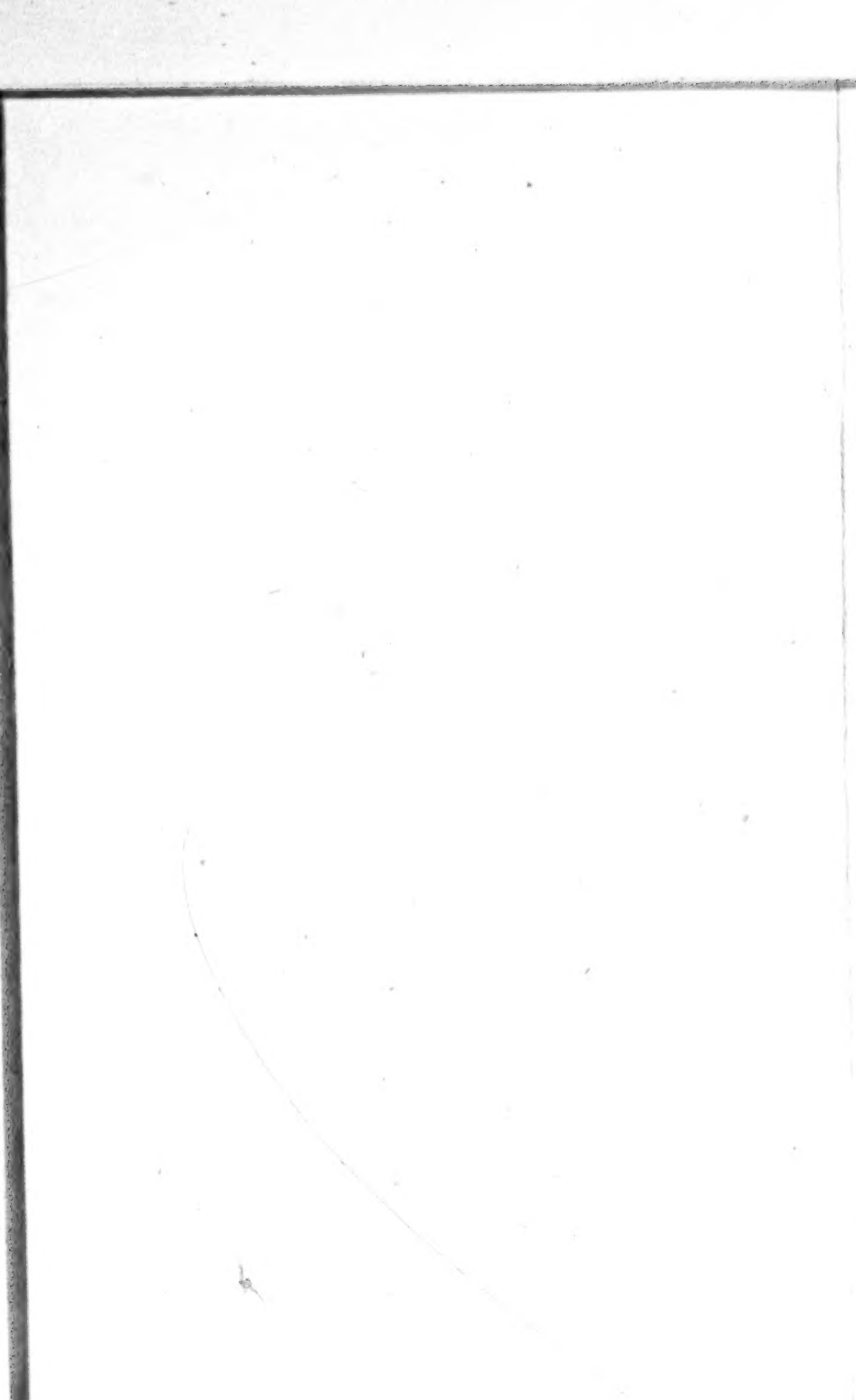


TABLE OF CONTENTS

	Page
Statement	1
Supplemental Argument	2
Conclusion	4

CITATIONS

Cases:

<i>Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Company, et al.</i> , District Court Arizona December 14, 1972 (unreported)	1, 2
<i>Skokomish Indian Tribe v. France</i> ,	
269 F. 2d 555, (1959);	3
320 F. 2d 205 (1963)	3
<i>Shulthis v. McDougal</i> , 225 U.S. 561 (1911)	4

Statutes:

25 U.S.C. 175	2
28 U.S.C. 1331	4
28 U.S.C.A. 1362	2

Miscellaneous:

House Report 2040	2
U.S.C.C. & A.N. 1966, p. 3147	2

IN THE
Supreme Court of the United States
October Term, 1972

No. 72-851

**THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known
as the ONEIDA NATION OF NEW YORK, also known as the
ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN
NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF
INDIANS OF WISCONSIN, INC.,**

Petitioners,

v.

**THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF
MADISON, NEW YORK,**

Respondents.

**SUPPLEMENTAL
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

STATEMENT

Since the filing of the petition herein, petitioners have learned of the decision in Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Company an Arizona corporation; Salt River Valley Water Users' Association, an Arizona corporation, et al., decided by the federal District Court for Arizona December 11, 1972 and filed December 14, 1972 (unreported). This decision supports Point I of the petition and sheds additional light on the Ninth Circuit's prior holdings on Point II. This supplemental petition is filed pursuant to Rule 24(5) of the Supreme Court Rules.

SUPPLEMENTAL ARGUMENT

From the decision in Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Company, et al. (unreported), it appears that an action in trespass was brought by an Indian Tribe out of possession against certain non-Indians in possession of the Indians' alleged land. A motion to dismiss for lack of jurisdiction was denied, and Judge Murray flatly disagreed with the opinion of the Second Circuit in petitioners' case on the applicability of 28 U.S.C.A. 1362 and concurred with the position urged by petitioners herein:

"In 1966 Congress passed 28 U.S.C. 1362 upon which the complaint herein relies for jurisdiction and which provides that the district courts are to have original jurisdiction of all civil actions brought by Indian tribes or bands wherein the matter in controversy arises under the Constitution, laws or treaties of the United States. Judge Friendly held in Oneida Indian Nation of N. Y. State v. County of Oneida, N. Y., 464 F. 2d 916, 919 note 4 (1972) that the sole purpose of §1362 was to remove any requirement of jurisdictional amount. Contrary to Judge Friendly's holding and consistent with Judge Lumbard who dissented in the Friendly decision this court finds that House Report No. 2040, which accompanied S. 1356 (28 U.S.C. 1362), indicates that in addition to removing the \$10,000 jurisdictional requirement of 28 U.S.C. 1331 the effect of the bill would be to provide the means whereby the tribes are assured of the same judicial determination whenever the government chooses not to exercise its discretion and declines to bring the action. U.S.C.C. & A.N. 1966, p. 3147. Reading these sections (25 U.S.C. 175, 28 U.S.C.

§§1331 and 1362) together it is apparent that this court has under §1362 a statutory grant of jurisdiction in this matter. Under §1362 any case which might have been brought by the United States is deemed to be one arising under the Constitution, laws or treaties of the United States if it is brought on behalf of an Indian tribe by their own attorneys."

In a later section of Judge Murray's opinion, the case of Skokomish Indian Tribe v. France, 269 F. 2d 555 (9 Cir. 1959) is cited for the proposition that the United States is not an indispensable party because the defendants could raise any defense (in proof of their right of possession) which could be raised by the United States. As thus interpreted by Judge Murray, the Skokomish case stands for the proposition that the plaintiff claiming under a treaty need not be in possession in order to bring an action - contra to the holding of the Second Circuit.

It appears that the Skokomish Tribe were out of possession and were claiming lands under federal treaty which non-Indians had been occupying for many years. See Op. in 320 F. 2d 205 (1963).^{1/} On the jurisdictional issue, the Ninth Circuit Court of Appeals held at 269 F. 2d 555, 558, 559:

"It is therefore our conclusion that under the allegations of the complaint a claimed right created by treaty is an essential element of appellant's cause of action. It is a right which will be supported if the treaty is given the construction for which appellant contends, and defeated if given the construction advocated by appellees. The controversy as to the meaning of the treaty is a genuine

^{1/} As alleged in the petitioners' complaint, par. 20, A48, the Oneida Indians too have sought the help of the United States, as trustee, and have been denied such help.

and present controversy. It is not specifically alleged in the complaint that appellees contest appellant's interpretation of the treaty. But this is necessarily to be inferred from the allegations concerning the nature of the claims which appellees assert.

"It follows that the complaint meets the essential tests requisite to the existence of federal-question jurisdiction under 28 U. S. C. A. §1331." ^{2/}

* * * * *

"We accordingly hold that the district court had federal-question jurisdiction under §1331. It was therefore error to dismiss the action as to all defendants for want of jurisdiction of the subject matter."

CONCLUSION

The Salt River decision reinforces petitioners' contentions that (a) 28 U. S. C. A. 1363 merits a broader interpretation than 28 U. S. C. A. 1331, and (b) possession of the land is not the crucial factor where claim is under a federal law or treaty.

If the Salt River decision and the decision of the court below both stand, then Indian Tribes in the Ninth Circuit area will have greater rights to protect their lands than Indian Tribes in the Second Circuit's area.

^{2/} It appears that the Ninth Circuit Court of Appeals interprets Shulthis v. McDougal, 225 U. S. 561, (1911) contra to the interpretation of the majority of the Second Circuit in petitioners' case.

For the reasons set forth in the petition and this supplemental petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

GEORGE C. SHATTUCK
BOND, SCHOENECK & KING
Attorneys for Petitioners
One Lincoln Center
Syracuse, New York 13202

January 19, 1973.